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Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1975

**No. 75-919**

JOE ROSATO, WILLIAM K. PATTERSON, GEORGE F. GRUNER and JIM BORT,

*Petitioners,*

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO,

*Respondent.*

## Reply Brief of Petitioners

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## Reply Brief of Petitioners

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This brief is submitted by way of reply to respondent's "Brief in Opposition to Petition for Writ of Certiorari."

At the outset this Court should note that respondent has obscured and distorted a key fact in referring to the events which transpired below by suggesting that the trial court's inquiry was limited to determining whether court officers had violated a protective order. The questioning of petitioners at the hearings below was, in reality, far more extensive in scope because it explored possible non-officer sources. Petitioner Rosato, for example, was asked when

he gained possession of the grand jury transcript. Rosato question no. 16, Pet. for Cert., App. p. 243. Petitioner Patterson was required to state whether *The Fresno Bee* obtained one or more copies of the grand jury transcript "from outside sources." Patterson question no. 13, *Id.*, p. 244. Petitioner Gruner was asked which *Bee* employee obtained a copy of the transcript. Gruner question no. 4, *Id.*, p. 246. Answers to these and similar questions would tend to pinpoint the time and place of the rendezvous and the name of the reporter who made contact with the source. The field of inquiry would be so limited by such questioning that the source's identity could be divined by guesswork, thus enabling respondent to accomplish by indirection what no reviewing court would permit it to do directly.

Moreover, petitioners reject the proposition that investigating court order violations is superior to the protection of confidential news sources even if such inquiry does not exceed those narrow bounds. We submit that respondent's stated objective at the hearings below was nothing more than an excuse for abridging otherwise unassailable First Amendment freedoms.

## THE FIRST AMENDMENT PRIVILEGE MUST BE RECOGNIZED HERE

Broadly read, the issue before this Court in *Branzburg v. Hayes,* 408 U.S. 665 (1972), was whether and to what extent reporters should answer questions relevant to the commission of crime. 408 U.S. at 683. The California Court of Appeals has clearly excepted the case at bench from the application of the *Branzburg* rule by finding that the hearings below were not an investigation into crime. *Rosato v. Superior Court,* 51 Cal.App.3d 190, 227, 124 Cal.Rptr. 427, 451 (1975).

On the one hand, for this Court to recognize petitioners' claim of a First Amendment privilege would in no way conflict with any of the theoretical bases for the holding in *Branzburg*. The functioning of the grand jury was in no way impeded and these reporters have withheld no information relevant to the investigation or prosecution of criminal defendants. On the other hand, for this Court to deny the petition for certiorari in this nationally-publicized case would enshrine a precedent which is crippling to press freedom everywhere. It was a confidential news source which enabled petitioners to obtain information about a conflict of interest prior to the approval of an important public contract. When the government itself is corrupt, the public has only the media and the courts to look after its interests.

The ability to protect his sources is a reporter's most valuable tool, and if he can be compelled to disclose a news source in a non-criminal setting such as that below, neither reporter nor source will hereafter be secure in the knowledge that the law will respect their confidential relationship. The devastating impact this uncertainty will have upon the reporting of news is impossible to gauge, but it is a certainty that in this age of widespread malfeasance in public office, any further shackling of the press is not in the public interest.

Respondent failed to discuss the *Branzburg* rule while asserting that the state court's holding was an adequate state ground dispositive of the First Amendment privilege claim. Resp. Brief, p. 12. This is absurd. State power cannot be used as an instrument for circumventing a federally-protected right. *Gomillion v. Lightfoot*, 364 U.S. 346, 347 (1960).

## THE GAG ORDER ENTERED BELOW WAS INVALID; THE ISSUE OF GAG ORDER STANDARDS MUST BE RESOLVED

Respondent has conceded that its review of the relevant gag order standards cases was only "cursory." Resp. Brief, p. 6. We submit that its attempt to harmonize the diverse approaches of the many courts which have addressed this issue is in a similar vein. There is no uniform rule as to the degree of potential interference with the administration of justice that is necessary to justify a restriction upon speech. *CBS, Inc. v. Young,* 522 F.2d 234 (6th Cir. 1975) disproves respondent's cumbersome and confusing distinction. Respondent's brief has also ignored the fact that some courts have formulated other tests conforming neither to the "clear and present danger" standard nor to the "reasonable likelihood" test. See, *e.g., Farr v. Pitchess,* 522 F.2d 464, 468 (9th Cir. 1975); *Commonwealth v. Lucchese,* 335 A.2d 508, 511 (Pa. Super. 1975). Whatever the proper standard may be, however, respondent's gag order is invalid when tested by the very standard approved by the Court of Appeals below.

Petitioners submit that the standards question is a latent issue in *Nebraska Press Association v. Hugh Stuart,* cert. granted, No. 75-817. In entering its restrictive order, the trial court in Lincoln County, Nebraska, found that there was a "reasonable likelihood of prejudicial publicity which would make difficult, if not impossible, the impaneling of an impartial jury" in the Simants murder case. Quoted from Brief of Petitioners in *Nebraska Press Association, supra,* p. 7. As noted in our petition for certiorari, the "reasonable likelihood" standard has only been followed by one of the Federal Courts of Appeal which have addressed the issue, and is, therefore, a minority rule.

The point is that the present proliferation of gag orders and court rules which prohibit the exercise of basic First Amendment rights is taking place without any direction from this Court as to what standards, if any, should be considered in the drafting of those orders and rules so as to protect constitutional rights. It is evident that no standard was observed by respondent in formulating its protective orders and, we submit, that disregard for First Amendment rights invalidated those orders.

## THIS CASE SHOULD BE CONSOLIDATED WITH NEBRASKA PRESS ASSOCIATION

As we have earlier noted, the grant of certiorari by this Court in *Nebraska Press Association, supra,* will not resolve the so-called "free press—fair trial" conflict if that case is heard alone or not consolidated with this case. Direct restraints upon the press are the exception rather than the rule when gag orders are imposed in criminal proceedings. By far the most widespread constitutional crisis which has resulted from the proliferation of gag orders and gag rules is the impingement upon news reporting by the gagging of news sources. By their routine use of "source constraint" protective orders, trial courts achieve by indirection the same stifling of news reporting that Judge Stuart accomplished in the *Nebraska Press Association* case with his direct restraint of the media.

This Court has traditionally been less concerned with form than substance. *United States v. New York, N.H. & H.R. Co.,* 355 U.S. 253, 263 (1957). In practical effect, an order prohibiting comment by a court officer or participant is not really designed to prevent such individual's chance disclosure of information covered by the order to his spouse or neighbor. Because it is from the press that a

prospective juror would be more likely to learn about a pending proceeding, it is the press which is the real target of gag orders, and it is the First Amendment rights of the press which are being sacrificed for judicial efficiency. See generally, Robert S. Warren and Jeffrey M. Abell, "Free Press—Fair Trial: The 'Gag Order,' A California Aberration," 45 So.Cal.L.Rev. 51, 74-77 (1972). Accordingly, this Court should cut through the semantic disguises and treat source constraints as, in actual effect, prior direct restraints upon the press.

We urge this Court to grant our petition and to consolidate this case for argument with *Nebraska Press Association* so that the real "First Amendment versus Sixth Amendment" crisis in our courts will be met with the formulation of a uniform national rule. The grant of certiorari in *Nebraska Press Association* recognized not only the importance of the issues there presented, but, also, that the lower courts have explored the subject matter and have experimented with diverse standards for the issuance and form of restrictive orders without settling the controversy. The present petition also presents issues of equal importance raised by the manner of trial court enforcement of source constraints. We submit that all these issues of recognized importance are now ripe for review by this Court.

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